SUPREME COURT, U. S.

JUN 14 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 248

MARYBELLE LOUISE O'BRIEN,

Petitioner,

vs.

SOCONY-MOBIL OIL CO. (successor to the VIRGINIA-CAROLINA CHEMICAL CORP.),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY AND TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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TABLE OF CONTENTS

	PAGE
Opinions Below	3
Jurisdiction of This Court	4
Question Presented	5
Constitutional and Statutory Provisions	5
Statement of the Case	6
The Manner in Which the Federal Question Was Raised	10
Reasons for Granting the Writ	12
Appendix:	
A—Opinions and Judgment of the Superior Court of New Jersey, Appellate Division	1a
B—New Jersey Supreme Court Mandate on Reversal	24a
C—Virginia Supreme Court Certificate Allowing Appeal	25a
D—Virginia Supreme Court Opinion	26a
E—Virginia Supreme Court Order of Dismissal	45a
F—New Jersey Supreme Court Order Denying Motion to Vacate Dismissal	46a

Cases Cited

Clark v. Henrietta Mills, 291 N. C. 1, 12 S. E. 2nd 682 (S. Ct. N. C. 1941) 16

Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435 (1932) ..12, 18

PAGE

Craddock-Terry Co. v. Powell, 181 Va. 417, 25 S. E. 2nd 363 (Sup. Ct. Vir. 1943) 16, 17

Ex Parte Norfolk Ry. & Light Co., 142 Va. 323, 128 S. E. 602 (1925) 9

Frozen Foods Express v. United States, 351 U. S. 40, 76 S. Ct. 569 17

Johnson v. Johnson & Briggs, Inc., 138 Va. 487, 122 S. E. 100 (Sup. Ct. Vir. 1924) 16

Keller v. Wilson Co., 21 Del. Ch. 391, 190 Atl. 115 (1936) 16

McNulty v. W. & J. Sloane, 184 N. Y. Misc. 835, 54 N. Y. Supp. 2nd 253 (Sup. Ct. 1945) 15, 16

Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923) 16

Patterson v. Durham Hosiery Co., 214 N. C. 806, 200 S. E. 906 (S. Ct. N. C. 1939) 16

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362 (1964) 13

Roberts v. Roberts-Wickes Co., 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N.S.) 1034 16

Rochester Telephone Corporation v. United States, 307 U. S. 125, 59 S. Ct. 754 17

Schaad v. Hotel Easton Co., 369 Pa. 486, 87 Atl. 2nd 227 (Sup. Ct. 1952) 16

Shanick v. White Sewing Machine Corp., 25 Del. Ch. 371, 19 Atl. 2nd 831 (Sup. Ct. 1941) 16

Sherman v. Pepin Pickling Co., 230 Minn. 87, 41 N. W. 2nd 571 (S. Ct. Minn. 1950) 16

PAGE

Treigle v. Acme Homestead Assoc., 297 U. S. 189 (1936) 15

Veix v. Sixth Ward B. & L. Assn., 310 U. S. 32 (1940) 14

Wessel v. Guantanamo Sugar Co., 134 N. J. Eq. 271, 35 Atl. 2nd 215, aff'd, 135 N. J. Eq. 506 (1944).... 16

Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N. E. 2nd 722 (Sup. Ct. Ill. 1949)..... 16

United States Constitution Cited

Fourteenth Amendment, Section 1..... 5, 19

Article I, Section 10, Clause 1 ..... 5, 19

Statutes Cited

28 U.S.C.:

Sec. 1257 (3) 4

Virginia Corporation Code, as amended, January 1, 1957:

Sec. 13.1-55 .....5, 6, 15

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the New Jersey Supreme Court entered March 21, 1967, and the judgment of the Supreme Court of Appeals of Virginia entered Janu-

ary 17, 1967 (petitioner was sent to the Virginia Court by the New Jersey Supreme Court). The Virginia Court order dismissed petitioner's appeal solely on jurisdictional grounds, after refusing to hear argument on the merits, but nonetheless in its opinion, passed on the merits and held that no contract or property rights of petitioner had been violated contrary to constitutional prohibitions.

When the N. J. Supreme Court refused to decide the constitutional claims on the merits, and for reasons of comity, sent petitioner to the Virginia Courts for relief, it reversed and voided petitioner's favorable judgment in the N. J. Superior Court, which had upheld her claims. The N. J. Supreme Court did, however, in its opinion, direct petitioner to return to it, and apply to reopen the judgment of reversal, if the Virginia Court failed or refused to take jurisdiction and decide the issues on the merits. In such case, the N. J. Supreme Court said it would decide the merits.

After the Virginia Supreme Court rejected jurisdiction, petitioner applied to the N. J. Supreme Court to re-open the judgment of reversal and decide the issues in the appeal on the merits. That verified application disclosed all the Virginia proceedings and action of the Court there, but the N. J. Supreme Court denied the application to reopen in short form Order, without opinion or explanation why it failed to do, what it had stated it would do.

Petitioner's favorable judgment in the N. J. Superior Court held that any attempt as made by respondent to cancel petitioner's rights to her cumulative preferred dividends, accrued prior to Jan. 1, 1957, would deny to her, constitutionally protected contract and property rights, because those dividends had accrued under stock contract and applicable statute terms which prohibited cancellation as

attempted. That judgment was voided by the New Jersey Supreme Court without ever passing on the merits of the case.

Petitioner asks review of the judgments of the Supreme Courts of both New Jersey and Virginia, because their coordinated actions have destroyed her Superior Court judgment establishing her contract and property rights, protected by the United States Constitution. Petitioner has been denied due process, and her contract and property rights clearly protected by the United States Constitution have been voided and confiscated under the guise of retroactive application of a Virginia statute, effective Jan. 1, 1957, regulating corporate recapitalization amendments.

Opinions Below

The opinions and judgments, in the order of their entry are as follows:

In the N. J. Superior Court, two written and one oral opinions were rendered. They were not reported in official or unofficial reports, but are found in Appellant's Appendix in the N. J. Superior Court, Appellate Division (used in the N. J. Supreme Court, which certified the case to itself before hearing in the Appellate Division) at pp. 102a, and 116a and 136a respectively. They are contained in Appendix A, attached to this petition, at pp. 1a to 23a incl., together with the Judgment entered in that Court.

The New Jersey Supreme Court opinion is reported in 44 N. J. page 25, 206 Atl. 2d 878, and is contained in Record No. 6293 at pp. 20 to 36 incl., which Record was printed by the Clerk of the Virginia Supreme Court. Nine additional copies of this red cover Record (containing the essentials) are filed concurrently herewith. The Judgment

entered by the New Jersey Supreme Court on its conditional reversal of the New Jersey Superior Court Judgment, is set forth in Appendix B, attached to this Petition, at p. 24a. Its final order entered March 21, 1967 appears in Appendix F, p. 46a.

The Virginia Corporation Commission (although petitioner never was a party to the proceedings before it) rendered an opinion after petitioner appealed to the Virginia Supreme Court. That opinion was rendered October 21, 1965 in support of it order made Sept. 28, 1962 (the same afternoon the majority stockholders approved the amendment). That opinion is contained in the red cover Record, above mentioned, at pp. 36 to 43 incl.

The opinion of the Virginia Supreme Court of Appeals is reported in 207 Va. 707, 152 S. E. 2nd 278 and together with the Order for Judgment of Dismissal on jurisdictional grounds, appears in Appendix D, attached hereto, at pp. 26a to 45a incl.

Jurisdiction of This Court

The final order and judgment of the New Jersey Supreme Court was entered March 21, 1967. The judgment and order of dismissal of the Virginia Supreme Court of Appeals, was entered Jan. 17, 1967, but on timely application, Mr. Chief Justice Earl Warren, extended the time within which petitioner can file this petition for a writ of certiorari to and including June 15, 1967.

The jurisdiction of this Court invoked under 28 U.S.C. Section 1257 (3). Petitioner claims that her contract rights have been impaired and her property taken without due process of law contrary to the provisions of the United States Constitution.

Question Presented

Where the usual rights of a dissenting stockholder to appraisal and payment are denied to her by the State law, can a State Corporation Code authorizing amendment of a corporation charter and its contract with its stockholders, be applied retroactive to its effective date, so as to permit a highly solvent corporation, by a recapitalization amendment, to void and cancel cumulative preferred stock dividends, which accrued prior to the contract amendment, and which accrued under prior contract and statute terms which prohibited such cancellation?

Constitutional and Statutory Provisions

The essential provisions involved in this case are contained in Article I, Section 10, Clause 1, and in Amendment 14th, Section 1, of the Constitution of the United States. The pertinent portions are as follows:

ARTICLE I, Section 10, Clause 1: "No State shall * * * pass any Bill of Attainder, *ex ppst facto* Law, or Law impairing the Obligation of Contracts,"

AMENDMENT XIV, Section 1, "* * * "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent portion of the Virginia Corporation Code (as amended effective Jan. 1, 1957) on which respondent claims the right to cancel petitioner's cumulative dividends accrued prior to Jan. 1, 1957, is Section 13.1-55 of the Virginia Code on Corporations, and the pertinent part thereof reads:

"Sec. 13.1-55 *Right to amend articles of incorporation.*—A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, * * *

"In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as

* * *

"(k) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared (whenever accrued and whether or not earned)."

Statement of the Case

The record facts in this case have never been in dispute. Prior to Jan. 1, 1957 and since, petitioner owned 100 shares of the 6% cumulative preferred stock of the Virginia-Carolina Chemical Corporation, which during the period of this litigation merged into the Socony-Mobil Oil Co., respondent herein. By the terms of the preferred stock contract, cumulative dividends of $1.50 per share accrued quarterly, and by Jan. 1, 1957, $73.50 had accrued on each share, and between then and the time of the amendment proposal, an additional $22.50 per share had accrued for a total of $96.00 per share. Respondent's predecessor, the Virginia-Carolina Chemical Corp. was a Virginia corporation with a capital and surplus in excess of $62,000,000.00, included in which was earned surplus of about $39,000,000.00. Under the Virginia Corporation Code, a recapitalization amendment was proposed, providing for the cancellation of all accrued cumulative dividends, and offering

preferred holders a package worth, at time of amendment about $140.00 per share as against call and accrued dividend value of over $200.00 per share, without even including in the latter value, the extra value of the preferred stock to share additionally with common in all dividends over $3.00 per share to common. At that time the earned surplus alone was about double all unpaid accrued dividends.

Unlike the Virginia statute applicable to merger cases, a stockholder dissenting to recapitalization, had no right to demand appraisal and payment, as is afforded by most state statutes in other states. Up to Jan. 1, 1957, the terms of petitioner's preferred stock contract, including the pertinent Virginia Statutes automatically a part of that contract, prohibited cancellation of such accrued cumulative preferred dividends, as here attempted by two-thirds vote of each stock class, as later authorized by the statute amendment effective Jan. 1, 1957. Because, after Jan. 1, 1957, all dividends accrued subject to the new contract term automatically imposed by the statute as a new amendment to the stock contract, petitioner never claimed constitutional protection of those dividends subsequently accruing subject to possibility of cancellation by the new contract term.

Petitioner did claim that the dividends as they had accrued unconditionally under contract and statute terms existing prior to Jan. 1, 1957, were additional contract obligations in the nature of a debt. She dissented to and voted against the attempt, under guise of corporate amendment, to confiscate those unconditionally accrued dividends. She claimed this would impair her contract rights and would confiscate her property without due process and compensation. When adopted by the requisite number of stockholders and immeditely (the same afternoon) by the

Corporation Commission, she as a resident of New Jersey, having an intangible property right there situate, sued in the New Jersey Superior Court seeking equitable protection by judgment declaring her rights to the dividends which had accrued prior to Jan. 1, 1957, protected by the United States Constitution against confiscation under guise of corporate recapitalization. She alleged that as each dividend accrued unconditionally, a new contract right arose out of the stock agreement, which while payable in the future was nonetheless an existent contract right and was her property protected as above mentioned. The predecessor of respondent was licensed to do business in New Jersey, and was personally served.

Petitioner won favorable opinion and judgment in the New Jersey Superior Court. Respondent appealed and the New Jersey Supreme Court certified the appeal to it before the Appellate Division of the Superior Court could hear the case. The Supreme Court heard argument on the case, and handed down an opinion in which it refused to pass on the merits of petitioner's constitutional claims, but still reversed and voided the judgment petitioner had obtained in the Superior Court, and told petitioner to go to the Virginia Courts for relief. The N. J. Supreme Court did however, state in its opinion that it retained jurisdiction, and if the Virginia Court failed or refused to take jurisdiction and decide the issues on the merits, then petitioner should return to N. J. and apply to vacate the judgment of reversal, and the N. J. Supreme Court would then decide the issues on their merits.

Petitioner believed she had a right to have her constitutional claims decided by the N. J. Supreme Court, but with the right to return as conditioned, she went to Virginia and followed the only remedy open, to wit, an appeal

from the order allowing the recapitalization, to the Virginia Supreme Court of Appeals. Under the Virginia law, this appeared the only way to raise the issues, even though she was never a party to the corporate amendment proceedings before the Corporation Commission. Indeed under decisions of the Virginia Supreme Court, incl. *Ex Parte Norfolk Ry. & Light Co.*, 142 Va. 323, 128 S. E. 602 (1925), she could not be a party, because in corporate amendment proceedings, that Commission can only act ministerially if the formal statutory requisites are complied with by the corporation.

After allowing the appeal as of right (Appendix C, p. 25a) and after full briefing on the merits, petitioner's counsel was advised Virginia Supreme Court would only hear argument on its jurisdiction (the appeal there necessarily, under the circumstances, having been filed more than 60 days after the amendment order), and the Court would not listen to argument on the merits. Despite this, when that Court rendered its opinion dismissing the appeal on jurisdictional grounds as untimely filed, it did pass on the merits and brushed aside petitioner's claim that her constitutional rights had been invaded by retroactive application of the 1957 statute to dividends accrued unconditionally prior to that date. It ignored the undisputed terms of the contract and the statute terms included in it, which prohibited such cancellation during the years of accrual. In its order of dismissal, the Virginia Supreme Court limited the basis of dismissal solely to the jurisdictional issues, but its opinion did pass on the status of petitioner's rights as above indicated.

Petitioner then applied to the New Jersey Supreme Court by filing a verified petition showing that the Virginia Court had refused jurisdiction as shown by its order of dismissal, and supplied the Court with copies of

the Virginia opinion. She asked the N. J. Court to reopen its judgment of reversal and to decide the merits of her constitutional rights issues, as it said it would if the Virginia Court did not take jurisdiction and render decision and judgment on the merits of those issues. Contrary to its previous decision to decide the merits, under the foregoing circumstances, the New Jersey Supreme Court responded to petitioner's application by denying the application without opinion or explanation, in a two line Order of Denial, shown in Appendix F, p. 46a.

Petitioner here presses her claims to constitutional protection of her contract and property rights to the end that she and other stockholders, with far greater number of shares, including charitable hospital foundation, (and who like her never waived those rights) may, after five years of oppressive litigation, at last receive justice assured by our Constitution.

Petitioner's favorable judgment in the N. J. Superior Court has been voided and taken from her, despite the fact that no appellate court both heard and decided the important constitutional issues on which the Superior Court judgment was founded.

The Manner in Which the Federal Question Was Raised

Petitioner, as plaintiff, filed complaint on Dec. 21, 1962 in the N. J. Superior Court, Chancery Division, Essex County, N. J. (found in Appellant's Appendix in N. J. Appeal, pp. 1a-9a incl.) in which she alleged that her contract and property rights were protected against confiscation as attempted, by the United States Constitution, and the trial Superior Court Judge so held. The complaint, in part, stated in paragraph 20, as follows:

> "20. The legislative enactments of the State of Virginia, affecting corporations organized under the laws of that state, may, under accepted law, affect corporations of said state and the rights of shareholders therein, including effects of recapitalization made pursuant to such laws, provided, however, that no such laws may retroactively impair contractual relationships between the shareholders and the corporation, nor may such laws retroactively authorize the taking of property rights of the shareholders contrary to the provisions of the United States Constitution, Article I, and the 14th Amendment of the United States Constitution, and provisions in said Constitution prohibiting the impairment of contractual relationships and the deprivation of property without compensation and due process of law. Any interpretation of statutes which would attempt to authorize the impairment of the contractual relationship and the taking of property without due process would require declaration of such law as unconstitutional in such respects."

In the Virginia litigation, the first pleading filed by petitioner was her Petition for Appeal, and at pp. 4-5 thereof, it stated:

> "Petitioner brought suit against V-C in the Superior Court of New Jersey, alleging that the recapitalization could not affect dividends which accrued prior to January 1, 1957, because they accrued prior to the statutory provision that became effective January 1, 1957, and which had the effect of modifying her contract from and after that date. She alleged that the rights which flowed from the certificates prior to that date were contract rights, in the

nature of a debt and constitutionally protected against impairment and against confiscation without due process and payment, the statute making no provision for appraisal and payment in the case of recapitalization."

Reasons for Granting the Writ

The N. J. Superior Court opinion, favorable to petitioner, held that under the United States Constitution and the United States Supreme Court case of *Coombes* v. *Getz*, 285 U. S. 434, 52 S. Ct. 435 (1932) petitioner's contract rights could not be impaired by retroactive application of the state statute, nor could her property rights be confiscated by cancellation as attempted. This Court in the *Coombes* case said:

> "The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and within limits not now necessary to define, the interrelations of state, corporation, and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired."

On appeal, the N. J. Supreme Court found that it had jurisdiction over the intangible property rights of petitioner, a New Jersey resident, in her transitory action against the defendant, personally served in New Jersey. Nonetheless, it failed in its obligation to protect petitioner's rights which she alleged were guaranteed by the United States Constitution. Instead, on the chance that the Virginia Courts might interpet the statute as only prospectively applicable, (despite its wording) and avoid the constitutional issues, the N. J. Supreme Court reversed

the Superior Court judgment, and sent petitioner to Virginia to establish her claimed constitutional rights, but also stating it would reopen and decide the merits if the Virginia Court did not take jurisdiction and decide those merits. Petitioner had a right to have had her constitutional issues decided by the N. J. Supreme Court, for by being bounced from the courts of one state to those of another, petitioner was denied justice from the practical standpoint. The New Jersey Court, by its reversal then and its subsequent denial of application to reopen for decision of the merits, denied petitioner hearing on her claimed constitutional rights. This Court in the case of *Reynolds* v. *Sims*, 377 U. S. 533, 84 S. Ct. 1362 (1964), said:

> "A denial of constitutionally protected rights demands judicial protection."

The Virginia Supreme Court refused to even allow petitioner to argue the merits of her claimed constitutional rights.

Although no appellate Court both heard and decided the merits of those claimed rights, petitioner has had her N. J. Superior Court judgment, upholding those rights under the United States Constitution, reversed and voided.

Petitioner's rights to her cumulative preferred dividends became additional contract rights between her and the corporation, as the dividends accrued unconditionally to Jan. 1, 1957. Up to the decision of the Virginia Court, here sought to be reviewed, no court in any state ever permitted dividend confiscation under the facts and circumstances undisputably present here, where we find:

1. a solvent corporation, with earned surplus about double the unpaid accrued dividends, and with stockholder

equity about three times the amount of the unpaid dividends;

2. the corporate amendment proceedings taken were not mergers, but a recapitalization, in which attempt was made to re-divide the corporate assets among the common and preferred stockholders;

3. attempt is made to apply the legislative enactment retroactively to its effective date, despite contract and statute terms in the stock contract theretofore existing which prohibited such action;

4. Under the Virginia law, no dissenting stockholder had the right to demand and get appraisal of the true value of his stock and to receive payment therefor;

5. the dissenting stockholder voted against the amendment, never waived her rights but contested the attempt, under guise of recapitalization, to cancel and confiscate her unconditional accrued dividend rights;

6. the action taken entailed no true public end, and solely accomplished private purposes, and was taken under claim of a statute which never entailed or was directed to a true public end, but to the contrary, was merely part of the state code generally regulating corporations.

That the above conditions existed here cannot be in dispute, and under them no case ever permitted forced cancellation of accrued cumulative preferred dividends by retroactive application of an amendatory statute which as of its effective date, amended the charter and stock contract.

The Virginia Supreme Court, in attempt to justify its conclusions, cited the case of *Veix* v. *Sixth Ward B. & L. Assn.*, 310 U. S. 32 decided by this Court in 1940. That

case dealt with an emergency statute which this Court said, "was passed in the public interest * * * for the economic welfare of the State." The Court also found that the financial institutions involved were of major importance to the State which retained adequate police powers to protest "against a catastrophe of excessive withdrawal."

That case is clearly inapplicable here where an ordinary corporation code revision adopted Jan. 1, 1957, was used Sept. 28, 1962 by private interests, for private gain, attempting to confiscate contract, property rights under guise of corporate amendment. The case decided by this Court which is applicable here, is the case of *Treigle* v. *Acme Homestead Assoc.*, 297 U. S. 189 (1936) wherein the Court said:

> "The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association, lawful when made. This cannot be done under the guise of amending the charter powers of the corporation."

All State Court cases which upheld the cancellation of past accrued cumulative dividends, did so either because the stock contract so conditioned the right to those dividends at the time they accrued; or because no surplus or fund ever existed in which the dividend holder had equitable right to payment at appropriate time; or because the value of those dividends could be obtained through right of appraisal and payment by a stockholder dissenting to the recapitalization (merger statutes, in most states, even in Virginia, provide for appraisal and payment rights, and thus are not applicable here). Cases allowing cancellation, in one or more of the above categories, include:

> *McNulty* v. *W. & J. Sloane*, 184 N. Y. Misc. 835, 54 N. Y. Supp. 2nd 253 (Sup. Ct. one judge

1945) where statute change providing appraisal and payment to a dissenter, changed the previous law set by the N. Y. Court of Appeals, in the case of *Roberts* v. *Roberts-Wickes Co.*, 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N.S.) 1034;
Western Foundry Co. v. *Wicker*, 403 Ill. 260, 85 N. E. 2nd 722 (Sup. Ct. Ill. 1949);
Sherman v. *Pepin Pickling Co.*, 230 Minn. 87, 41 N. W. 2nd 571 (S. Ct. Minn. 1950).

The overwhelming weight of authority of the cases throughout the country, support petitioner's claims under the facts here existing. Among them are the following leading cases, which even include analogous Virginia decisions:

Morris v. *American Public Utilities Co.*, 14 Del. Ch. 136, 122 Atl. 696 (1923);
Keller v. *Wilson Co.*, 21 Del. Ch. 391, 190 Atl. 115 (1936);
Shanick v. *White Sewing Machine Corp.*, 25 Del. Ch. 371, 19 Atl. 2nd 831 (Sup. Ct. 1941);
Wessel v. *Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 Atl. 2nd 215, aff'd 135 N. J. Eq. 506 (1944);
Schaad v. *Hotel Easton Co.*, 369 Pa. 486, 87 Atl. 2nd 227 (Sup. Ct. 1952);
Patterson v. *Durham Hosiery Co.*, 214 N. C. 806, 200 S. E. 906 (S. Ct. North Carolina 1939);
Clark v. *Henrietta Mills*, 291 N. C. 1, 12 S. E. 2nd 682 (S. Ct. N. Carolina 1941);
Craddock-Terry Co. v. *Powell*, 181 Va. 417, 25 S. E. 2nd 363 (Sup. Ct. Virginia 1943);
Johnson v. *Johnson & Briggs, Inc.*, 138 Va. 487, 122 S. E. 100 (Sup. Ct. Virginia 1924).

The holdings in the above cases indicate that as cumulative preferred dividends accrued, there was created an additional contract obligation between the corporation and the stockholder, which was in the nature of a debt, and which could not be destroyed under guise of recapitalization amendment, because of the Constitutional prohibitions against the impairment of contracts and against the taking of property without due process.

While the Virginia Supreme Court based it Order of Dismissal, solely on jurisdictional grounds, its opinion (despite denying petitioner opportunity to argue the merits) passed on the merits, and *ex parte* determined and fixed the status of petitioner's property and constitutional rights. For this reason, its determination appears to be appealable under the law laid down by this Court in the cases of:

> *Frozen Foods Express* v. *United States,* 351 U. S. 40, 76 S. Ct. 569 and
> *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 59 S. Ct. 754.

Furthermore the Virginia Supreme Court denied equal protection of the law to the identical rights, by denying them constitutional protection here, while upholding them in a case where the attempt to re-divide the corporate assets among common and preferred stockholders was by way of dissolution and use of a new entity. In the case of *Craddock-Terry Co.* v. *Powell, supra,* the Virginia Supreme Court held that the preferred cumulative holder was entitled to all accrued cumulative dividends, and said:

> "The rights thereby established with respect to the stockholders as between each other and between the stockholders and the corporation, are contractual. * * *

> "If the provisions of these two statutes are construed to mean what appellants contend they mean, then the legislature has empowered a two-thirds majority of stockholders in a solvent corporation to eliminate at will the contractual obligations (and what have been regarded heretofore as vested rights) of preferred stockholders. To read this meaning into the statute raises a serious constitutional question." (Citing cases including *Coombes* v. *Getz,* 285 U. S. 434).

After the citations, the Court said:

> "The Legislature, in the exercise of this power, has no right to enact a law which impairs vested contractual rights.
>
> "Ninety-five percent of the stockholders have agreed to a different distribution, but such an agreement is not binding upon appellees who have not assented thereto."

The above case was recognized, in the Virginia Court's decision herein, as present good law, and its refusal to give the same constitutional protection here to the same kind of rights, constitutes denial to petitioner of equal protection of the laws.

The New Jersey Supreme Court denied petitioner both justice and due process in voiding her Superior Court judgment upholding her rights under the United States Constitution, while at the same time it refused to decide the merits.

No state statute, under the claim of reserved power over its corporations, and under the guise of charter amendment, promoted by corporate manipulators, can justify re-

troactive application of a statute which imposed an amendment on the stock contract, so as to confiscate rights to dividends, which when they accrued, were protected against such cancellation by the very terms of the contract including all applicable laws which are a part of the contract by operation of law. To permit confiscation as here attempted would be to nullify Article I, Sec. 10, Clause 1, and 14th Amendment, Sec. 1 of the United States Constitution.

Cumulative preferred stocks are a favorite investment among those unskilled in finance, because if not otherwise conditioned, the investor counts on getting the dividends, if not currently, then at least later when the corporate surplus has the required funds. Such investors should be able to rely on their contract rights, and this Court should protect all such small investors, by clearly rejecting attempts, such as here, to destroy, by devious retroactive use of charter amendments, the contract property rights protected by the Federal Constitution.

It is respectfully requested that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

New Jersey Superior Court Opinions and Judgment

Opinion.

Decided December 6, 1963.

Mr. James F. X. O'Brien for plaintiff.

Mr. Dickinson R. Debevoise for defendant (Messrs. Riker, Danzig, Scherer & Brown, attorneys).

Mintz, *J. S. C.*

This matter is before the court on defendant's motion for summary judgment and plaintiff's counter-motion to strike the First, Second, Third, Fourth and Fifth Separate Defenses in defendant's answer.

The following facts are uncontroverted. Plaintiff is a New Jersey resident. The defendant, a corporation organized under the laws of the State of Virginia, is authorized to transact business within the State of New Jersey. Plaintiff since 1926 has been the owner of 100 shares of 6% preferred stock in defendant corporation. Pursuant to a provision in the corporation law of Virginia, § 13.1-55, effective January 1, 1957, defendant submitted a plan of re-capitalization to its stockholders of record. The plan was approved on September 28, 1962 by the necessary two-thirds vote of the stockholders. Plaintiff voted her stock against the plan.

In essence, the re-capitalization provided for the retiring of the 6% preferred stock in consideration for the issuance of (i) 1 share of common stock, (ii) 1.3 shares of 5% $50 par value prior preferred stock, and (iii) 1 share of 5% $50 par convertible preferred stock (convertible into 1.1 additional shares of common stock).

Throughout the years that plaintiff has been the holder of 100 shares of the preferred stock and until 1957, there accumulated $73.50 per share in accrued but undeclared dividends. The plan of re-capitalization purported to elim-

inate this alleged indebtedness. Plaintiff urges that she is vested with an indefeasible right to the accrued dividends which cannot be divested by this approved plan of re-capitalization.

Plaintiff acknowledges the right of defendant to re-capitalize under the cited Virginia statute effective January 1, 1957 upon the two-thirds vote of the common and preferred stockholders. Her complaint merely seeks a finding that her rights to the accrued dividends prior to January 1, 1957 cannot be eliminated by the re-capitalization plan and that she must be paid such accrued but undeclared dividends prior to payment of any dividend on the common stock. She alleges a willingness to surrender her stock certificate in exchange for new certificates under the re-capitalization, but not at the expense of surrendering her property rights in the accrued dividends amounting to $7,350.

The basic questions involved can be stated as follows:

1. Does the reserved power to alter or amend the charter of a corporation include the right to eliminate vested, preferential or contractual rights of dissenting shareholders?

2. Does the elimination of accrued dividends on preferred stock constitute a violation of the fourteenth amendment of the Federal Constitution by the taking of property without due process of law? Is such action likewise violative of Art. 1, § 10, par. 1 of the said Constitution, which prohibits a State from impairing the obligation of contracts?

At the time defendant was incorporated, § 154 of the Virginia Constitution (adopted in 1902) expressly provided that the State law pertaining to the creation of cor-

porations and amendments of charters was subject to amendment or repeal. The certificate of incorporation of defendant corporation, in conformity with the constitutional provision, contained the following clause:

> "The corporation reserves the right to amend, alter, change or repeal any provisions contained in this certificate in the manner now or hereafter prescribed by law."

The certificate of incorporation, constitution and by-laws of a corporation, constitute a contract between the corporation and its stockholders, and the stockholders inter sese. *Insurance Ass'n* v. *Horton,* 157 Va. 114, 160 S. E. 315 (Sup. Ct. of App. 1931); *Faunce* v. *Boost Co.,* 15 N. J. Super. 534 (Ch. Div. 1951). The Virginia Court has likewise held that:

> "Although the power reserved is to alter, amend, or repeal the charter, it is not limited to changes or alterations solely between the state and the corporation, but authorizes amendments and alterations within certain limitations directly affecting the stockholders in their relations to the state, to the corporation, and to each other." *Winfree* v. *Riverside Cotton Mills Co.,* 113 Va. 717, 75 S. E. 309 (Sup. Ct. of App. 1912).

Dispositive of the rights conferred on defendant corporation under the reserved power of the Virginia Constitution and its articles of incorporation is *Coombes* v. *Getz,* 285 U. S. 434 (1931), where the court said at p. 441:

> "The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the inter-

relations of state, corporation and stockholders may be changed; *but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired.*" (Emphasis supplied.)

Hence, if the right to accrued dividends is a vested property or contractual right, the destruction of such right may not be accomplished under the guise of the exercise of a reserved power.

Concededly, the controlling substantive law is that of the State of Virginia. However the precise question raised in the instant case has not been decided by the Virginia courts. Nevertheless preferred stockholders have brought suits in Virginia to ascertain their status. In *Johnson* v. *Johnson & Briggs, Inc.*, 138 Va. 487, 122 S. E. 100 (Sup. Ct. of App. 1924), the court said at p. 102:

"• • • While he is not a creditor of the corporation he has in the distribution of such assets, as between himself and the common stockholders, a *preferential claim* to the assets which is superior to the claim of the common stockholders, and this because the contract so provides." (Emphasis supplied.)

The court then went on to discuss the preferred stockholders' right to accrued dividends:

"• • • Cumulative dividends generally signify returns which gather volume by addition—delayed payments on account of anticipated dividends, which, although not presently earned, confer upon the stockholder the *contractual right* to require payment thereof in full out of future earnings before there can be any dividend on the common stock." (Emphasis supplied.)

The *Johnson* case indicates that Virginia considers the preferred stockholders' right to accrued dividends to be a preferential and contractual right.

In *Schaad* v. *Hotel Easton Co.*, 369 Pa. 486, 87 A. 2d 227 (Sup. Ct. 1952), the court was presented with the exact question raised in the instant case, i.e., can accrued dividends on preferred stock be eliminated by a plan of recapitalization? It said at p. 232:

> "* * * it is clear that, since the interest of a preferred shareholder in cumulative, accrued dividends, even if not a 'vested property' right is certainly at least a *contractual right* * * *." (Emphasis supplied.)
>
> * * * * * *
>
> "* * * Any attempted statutory authorization of a corporation to destroy the *preferential right* to the accrued dividends would seem to involve either an unconstitutional deprivation of property, or an impairment of the obligation of contracts, or both, and this notwithstanding the reserved power of amendment." (Emphasis supplied.)

Thus without deciding if accrued dividends are vested property rights, the Supreme Court of Pennsylvania concluded that it is at least a *contractual right* that is protected by the Federal Constitution. This decision is significant since the Virginia Court has expressed, in *Johnson, supra,* its position on the right of accrued dividends, namely, that it is a *contractual* and *preferential right.*

Many other states have considered the right of preferred stockholders to accrued dividends. See *Validity of Cancellation of Accrued Dividends on Preferred Corporate Stock,* 8 A. L. R. 2d 893 (1949); *Rights of Preferred*

Appendix A

Stockholders as to Passed or Accumulated Dividends in Going Concern, 27 A. L. R. 2d 1073 (1953). Defendant stresses *McNulty* v. *W. & J. Sloane,* 184 N. Y. Misc. 835, 54 N. Y. S. 2d 253 (Sup. Ct. 1945). *McNulty* did approve of a plan of re-capitalization whereby the preferred stockholders' right to accrued dividends was destroyed. The factual background is also strikingly similar to the instant case for the New York Corporate Statute was amended after the accrued dividends were in arrearage so as to permit their elimination.

However, *McNulty* must be viewed in the light of prior New York decisions. In *Wiedersum* v. *Atlantic Cement Products,* 261 App. Div. 305, 25 N. Y. S. 2d 496 (App. Div. 1941), the court held that accrued dividends were vested property rights and could not be eliminated by a plan of re-capitalization. The case was decided prior to the amendment of the New York statute relied on in *McNulty.* Since the *McNulty* court was a trial court, it seems questionable that its opinion can be a complete expression of New York law if considered as overruling *Wiedersum.*

The corporate statute considered in *McNulty* provides that dissenting stockholders have the right to an appraisal of their holdings and payment for them in cash. The court, in fact, made special reference to this right, stating at p. 262:

> "* * * The Legislature sought to guard against possible evil consequences by requiring a sufficient notice to stockholders, and a vote by the holders of record of two-thirds of the outstanding shares of each class of stock and by giving dissenting stockholders the right to an appraisal of their holdings and payment for them in cash."

Significantly, the Virginia statute in permitting the elimination of accrued dividends makes no provision for dissenting stockholders to have the value of their stock appraised.

Although in *McNulty* the court found that accrued dividends were not vested property rights, it held them to be *preferential rights*. It permitted the elimination of these preferential rights, stating at p. 261:

> "* * * The very essence of the reserved power of the Legislature is to enable it to change preferential rights of the different classes of stock in a corporation. Section 38 (9) of the Stock Corporation Law recognizes this, for it provides that if a certificate of amendment 'alters the preferential rights of any outstanding shares, any holder of such shares not voting in favor of such alteration' may file a written dissent and have his stock appraised and paid for."

Hence, the New York statute provides for appraisal if preferential rights are affected, and thus is clearly distinguishable from *Schaad, supra,* where no appraisal rights existed so as to lead the Pennsylvania court to hold that preferential rights (accrued dividends in arrearages) of preferred stockholders could not be eliminated.

In *Thomas Branch & Co.* v. *Riverside & Dan River Cotton Mills,* 139 Va. 291, 123 S. E. 542 (Sup. Ct. of App. 1924), the court said at p. 544:

> "The Virginia corporation law is in practically the same words as the New Jersey law, except that the New Jersey law does not contain paragraph 9, § 1105a, Code of Virginia 1904. See Public Laws of New Jersey, 1908, p. 127.

> In adopting the New Jersey law, the construction placed upon it by the New Jersey courts will be considered as having been adopted also."

Although *Thomas Branch & Co.* was not concerned with the issues involved in the instant case, it does suggest that Virginia would view favorably New Jersey decisional law on the right of a corporation to eliminate accrued dividends in arrearages by a plan of re-capitalization.

The New Jersey law clearly holds that accrued dividends are vested property rights and cannot be eliminated by a plan of re-capitalization. *Wessel* v. *Guantanamo Sugar Co.*, 134 N. J. Eq. 271 (Ch. 1944); *Kamena* v. *Janssen Dairy Corp.*, 133 N. J. Eq. 214 (Ch. 1943). In *Wessel* it was said at p. 273:

> "* * * Nor has the defendant power under the act of 1926 to fund or satisfy those rights of complainants as preferred stockholders in respect to dividends in arrear, by issuing common stock thereof, or otherwise * * * *and thus wipe out a vested right in the nature of a debt owing to complainants.*" (Emphasis supplied.)

Defendant urges that there are numerous decisions in which courts have approved the elimination of accrued dividends upon corporate mergers or consolidations. *Federal United Corp.* v. *Havender*, 24 Del. Ch. 318, 11 A. 2d 331. (Sup. Ct. 1940); *Porges* v. *Vadsco Sales Corp.*, 27 Del. Ch. 127, 32 A. 2d 148 (Ch. 1943); *Anderson* v. *Cleveland-Cliffs Iron Co.*, 54 Abs. 65, 87 N. E. 2d 384 (Ohio, Com. Pleas 1948). Hence the same principle should be applicable to a plan for re-capitalization.

Wessel, supra, pointedly met and rejected this particular contention, at p. 274, stating that:

"* * * The plan here proposed is mandatory and is therefore distinguishable from those reported cases which deal with a plan of merger or consolidation, wherein a change is proposed in preferred stock which includes the elimination of dividend arrearages thereon. In cases of merger or consolidation the terms proposed are not mandatory but preferred stockholders have the right to decline the offered terms and have their stock appraised and to receive cash in payment thereof."

As already observed the defendant's re-capitalization afforded no opportunity to a dissenting stockholder to have his stock appraised and receive cash in payment thereof. See also *Shanik* v. *White Sewing Machine Co.*, 25 D. Ch. 371, 19 A. 2d 831 (Del. Sup. Ct. 1941).

Defendant also contends that if plaintiff's right to the accrued dividends is preserved, it will result in placing her in a more advantageous position than the other preferred stockholders. This is true, but it is an advantage to which plaintiff is entitled for she did not assent to the cancellation of such dividends. See *Wiedersum* v. *Atlantic Cement Products, supra.*

From the foregoing I am satisfied that whether the plaintiff's right to accrued but undeclared dividends be labeled either a vested, preferential or contractual right, it is protected by the Federal Constitution, namely, the prohibition against the taking of property without just compensation and the prohibition against the impairment of the obligation of contracts.

The *Virginia Corporation Law*, § 13.1-55, effective January 1, 1957, reads:

"A corporation may amend its articles of incorporation, from time to time, in any and as many re-

spects as may be desired, provided that the amendment may contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making such amendment.

In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as:

* * * * * *

(f) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued.

(g) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, limitations, voting rights or relative or other rights of any nature in respect of all or any part of its shares, whether issued or unissued.

* * * * * *

(j) To create new classes of shares having rights and preferences either prior and superior or subordinate and inferior to the shares of any class then authorized, whether issued or unissued, or increase the rights and preferences of any class having rights and preferences prior and superior or subordinate and inferior to the shares of any other class.

(k) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared (whenever accrued and whether or not earned)."

A finding that accrued but undeclared dividends prior to January 1, 1957, the effective date of the statute, cannot

be divested, does not require this court to hold the Virginia statute unconstitutional. The statute may be construed retrospectively as well as prospectively. Generally, statutes are construed to be prospective in operation unless otherwise specified. *County School Board* v. *Town of Herndon,* 194 Va. 810, 75 S. E. 2d 474 (Sup. Ct. of App. 1953); *Ferguson* v. *Ferguson,* 169 Va. 77, 192 S. E. 774 (Sup. Ct. of App. 1937); *Phipps* v. *Sutherland,* 201 Va. 448, 111 S. E. 2d 422 (Sup. Ct. of App. 1959). Courts constantly place a construction on a statute so as to uphold its constitutionality. *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749 (Sup. Ct. of App. 1955); *Town of Ashland* v. *Board of Supervisors,* 202 Va. 409, 117 S. E. 2d 679 (Sup. Ct. of App. 1961); *Harrison* v. *Day,* 202 Va. 967, 121 S. E. 2d 615 (Sup. Ct. of App. 1961). To construe the Virginia statute prospectively does not create a strained interpretation. The words "whenever accrued and whether or not earned" may be construed so as to approve the elimination of dividends accruing after January 1, 1957.

Defendant further urges that the declaration of a dividend on the preferred stock is generally in the discretion of the Board of Directors. Hence, plaintiff may not receive the accumulated but undeclared dividends. The plaintiff, however, does not seek the declaration of a dividend, but rather a determination that her *right* to accumulated dividends up to January 1, 1957 cannot be destroyed by a recapitalization plan to which she dissented.

Finally the defendant contends that under the Virginia Corporation Act the state has granted to the Corporation Commission the exclusive right to approve charter amendments of Virginia corporations, with a right of judicial review by way of appeal to the Supreme Court of Appeals. *Va. Corp. Law* § 13.1-125. Hence, says defendant, this court lacks jurisdiction to hear the case.

Appendix A

The Corporation Commission is vested with authority to issue a certificate of amendment to a corporate charter, and review by the Commission on a stockholder's petition is solely for a misstatement of a material fact as to compliance with the statutory requirements. *Va. Corp. Law* § 13.1-125. Plaintiff's complaint does not assert non-compliance with any statutory requirements, and accordingly is not within the statutory jurisdiction of the Virginia Corporation Commission.

Additionally it is to be observed that the cited Virginia statute (13.1-125) may be regarded as procedural in nature. In such event, this state, as the forum state, would apply its own procedural law notwithstanding that the substantive law of Virginia controls. *Marshall* v. *Geo. M. Brewster & Son, Inc.*, 37 N. J. 176 (1962); *Guardian Life Ins. Co. of America* v. *Rita Realty Co.*, 17 N. J. Misc. 87 (Sup. Ct. 1939).

Plaintiff is suing to establish her right to accrued but undeclared dividends. Such action is clearly transitory and does not concern itself with the internal affairs of the defendant corporation. Hence, the State of New Jersey is as proper a forum as would be the State of Virginia.

For the reasons advanced, defendant's motion for summary judgment is denied. It necessarily follows that the First Separate Defense in defendant's answer, which asserts that the complaint fails to state a claim upon which relief can be granted, should be stricken. The assertion in the Second Separate Defense that defendant's plan of recapitalization was fair and equitable and in accordance with Virginia law, is not relevant in the light of the conclusion that dividends accruing prior to January 1, 1957 constitute rights protected under the Federal Constitution and cannot be destroyed, and the further determination that the pertinent Virginia statute is to be afforded prospective, and not

retroactive, effect. This defense is likewise stricken. The Third and Fourth Separate Defenses, which assert that the reserved power under the Virginia Constitution and the articles of incorporation to amend the corporate charter confers upon the corporation the power to eliminate accrued and undeclared dividends, must be stricken in view of this court's finding to the contrary as to the plaintiff, a dissenting stockholder. The Fifth Separate Defense, which alleges that plaintiff's relief, if any, was by way of appeal from the order of the Virginia State Corporation Commission to the Supreme Court of Appeals of Virginia, is likewise stricken for the reasons heretofore advanced.

A form of order consistent with the views herein expressed will be presented, consented to as to form or to be settled on notice.

Appendix A

Letter Opinion.

January 16, 1964

James F. O'Brien, Esq.
17 Academy Street
Newark 2, New Jersey

Riker, Danzig, Scherer & Brown, Esqs.
Att'n. Dickinson R. Debevoise, Esq.
744 Broad Street
Newark 2, New Jersey

Marybelle Louise O'Brien v. Virginia-Carolina Chemical Corporation—Docket No. C-1024-62

Gentlemen:

Defendant moves for an order granting a rehearing on the motion for summary judgment, and on plaintiff's motion to strike the First, Second, Third, Fourth and Fifth Separate Defenses in the defendant's answer.

Supplemental briefs were submitted, and extensive oral argument presented on this application. I have concluded that my ultimate conclusion embodied in my written opinion of December 6, 1963 should not be disturbed.

Basically the arguments presented by counsel were substantially the same as those presented on the argument of the original motions. However one point stressed by defendant on this application, not originally urged, deserves comment.

It is urged that under Section 12-63 of the Virginia Corporation Law any party aggrieved by any final finding, order or judgment of the Corporation Commission shall have, of right, an appeal to the Supreme Court of Appeals, which shall be taken and perfected within four months from

the date of such finding, order or judgment. Since this Section permits an appeal on any ground by an aggrieved stockholder, the defendant asserts that the plaintiff was obliged to present her claims to the appellate tribunal within the four month period. See *French* v. *Cumberland Bank & Trust Co.*, 194 Va. 415, 74 S. E. 2d 265 (1953). Having failed to do so, this court must under the Federal Constitution accord "full faith and credit" to the final finding, order or judgment of the Virginia Corporation Commission approving defendant's recapitalization. It is urged that such full faith and credit encompasses not only the issues presented and passed upon by the Commission, but any and all issues that might have been presented to the Supreme Court of Appeals.

I cannot reach the result urged by defendant. Plaintiff was not a party to the proceeding before the Virginia Corporation Commission. Defendant concedes that the Commission was not empowered to pass upon, and did not pass upon, the issues raised by plaintiff in her complaint filed in this proceeding.

The constitutional and other issues the plaintiff here projects may have been presented (but were not) as original issues on appeal to the Virginia Supreme Court of Appeals within the four month period. Hence I am of the view that the full faith and credit clause applies only to such issues which the Commission was empowered to pass upon. Accordingly, I find that the full faith and credit clause does not bar plaintiff's complaint.

Very truly yours,
NELSON K. MINTZ.

Appendix A

Transcript Setting Forth Judge Mintz's Oral Opinion.

(Filed May 1, 1964.)

Newark, New Jersey,
March 20, 1964.

Before:

HONORABLE NELSON K. MINTZ, *J. S. C.*

Appearances:

JAMES F. X. O'BRIEN, ESQ., Attorney for Plaintiff.

RIKER, DANZIG, SCHERER & BROWN, By DICKINSON R. DEBEVOISE, ESQ., Attorney for Defendant.

The Court: The defendant's answer is solely directed to the amount of damages that the plaintiff can recover based upon the prior determination by this Court in which I denied the defendant's motion for summary judgment. The thrust of the defendant's sixth, seventh, eighth and ninth separate defenses contained in the proposed amended answer is that the plaintiff cannot have the benefit of the recapitalization plan and the accrued dividends of $73.50 per share.

It maintains that according to the articles of incorporation of the defendant corporation it had the right to redeem the preferred stock for $105 plus accrued dividends. It urges that as of September 9, 1962, the total value of the stock was $195. Hence the plaintiff is entitled to that amount plus interest, or the plaintiff could elect to take the stock offered in the recapitalization which presently has a value greater than the $195 amount, but that she cannot recover both the stock offered in the recapitalization and the accrued dividends.

That in essence is the defendant's position. But this view as I see it fails to take into consideration the fact that the defendant did not redeem the preferred stock in 1962 but chose to recapitalize.

The plaintiff did not urge and this Court did not find that the defendant could not recapitalize. This Court did hold that the defendant's right to accrued dividends were preserved notwithstanding the recapitalization. Since the defendant chose to recapitalize and not redeem the preferred stock it cannot argue that the plaintiff is only entitled to the dollar amount that the plaintiff would have received upon redemption.

Examination of the present market value of the stock is not the criterion to determine what the plaintiff is entitled to recover. If such speculation is resorted to the plaintiff as well could argue and did argue that if given $195 in September, 1962 and invested in common stock of the defendant the present value would be far in excess of what she could receive by obtaining stock in recapitalization plus her right to accrued dividends.

As I have already observed in my earlier opinion, and I quote, "Defendants also contend that if plaintiff's right to the accrued dividends is preserved, it will result in placing her in a more advantageous position than the other preferred stockholders. This is true, but it is an advantage to which plaintiff is entitled, for she did not assent to the cancellation of such dividends." In connection with that opinion I cited a New York Appellate Division opinion, *Wiedersum* v. *Atlantic Cement Products,* 25 N. Y. Supp. 2d page 496.

Now, the tenth separate defense of the defendant is that the plaintiff is not entitled to accrued dividends in the amount of $73.50 since after January 1, 1957, the de-

fendant paid $11.50 in dividends on the preferred stock, and such amount should be credited against the amount if arrearages on the current dividend of six per cent per share were due to be paid upon the preferred stock without payment being earmarked as payment on account of the dividends in arrears. There is no justification to apply such dividends in reduction of prior arrearages on the stock. It appears inequitable to this Court to credit the dividend payments after January 1, 1957, against arrearages which the defendant could not destroy, rather than on arrearages which it could and did destroy by reason of the recapitalization.

The eleventh separate proposed defense by the defendant asserts that any impropriety in the defendant's acts was cured by the merger of the defendant with Socony Mobil, for at the time of this rather recent merger she had appraisal rights if she dissented. This argument again overlooks the plaintiff's right to accrued dividends for if she had appraisal rights she wouldn't have been entitled to accrued dividends.

I am of the view that the proposed amendments to the answer are without legal merit. I have already adjudicated the basic proposition that the recapitalization plan invoked by this defendant could not destroy the contractual preferential or property right that this plaintiff as a preferred stockholder, a dissenting preferred stockholder, enjoyed at the time of the recapitalization.

Now, what is there to say with respect to the motion for summary judgment? I think perhaps that should follow as a matter of course.

Mr. Debevoise: I would just want to be sure it is understood that everything I have said in opposition to your original determination would apply.

The Court: You have a continuing and perhaps meritorious objection. I don't know. I have tried to give this troublesome issue the analysis and the result that I think it should receive. I suppose having denied the application for leave to file the amended answer that the plaintiff is entitled to a summary judgment declaring that the recapitalization does not destroy her property rights to $73.50 per share of cumulative dividends accrued up to January 1, 1957. I am certainly not going to declare a dividend. I think further the plaintiff is entitled to the judgment that the defendant may not withhold from the plaintiff the substituted shares provided for in the recapitalization.

Will you gentlemen endeavor to agree upon a proposed form of order? If not, I will settle the form of order.

Order.

(Filed March 23, 1964.)

This matter having come before the Court on defendant's motion for summary judgment, and on plaintiff's counter motion to strike the First, Second, Third, Fourth and Fifth Separate Defenses in defendant's answer, in the presence of Dickinson R. Debevoise, Esq., a member of the firm of Riker, Danzig, Scherer & Brown, representing defendant, and James F. X. O'Brien, Esq., representing the plaintiff, and the Court having read and considered the briefs of plaintiff and defendant, and having heard and considered the argument of counsel, and having further read and considered defendant's supplemental brief and plaintiff's reply thereto, and having made and filed on December 6, 1963 a written opinion disposing of said motions; and upon further motion of defendant for rehearing

subsequent to said opinion of this Court, heard in the presence of said counsel, and the Court having read and considered the briefs of plaintiff and defendant on said motion for re-argument, and having heard and considered oral argument thereon; and good cause having been shown,

It is, thereupon, on this 23rd day of March, 1964, ORDERED that defendant's motion for summary judgment be, and the same is hereby denied, and

It is further ORDERED that plaintiff's motion to strike the First, Second, Third, Fourth and Fifth Separate Defenses in defendant's answer be, and the same is hereby granted, and said defenses are hereby stricken, and

It is further ORDERED that defendant's motion for rehearing be, and the same is hereby denied.

NELSON K. MINTZ,
J. S. C.

Consented to as to form only.

RIKER, DANZIG, SCHERER & BROWN,
Attorneys for Defendant,

By: DICKINSON R. DEBEVOISE,
A Member of the Firm.

Appendix A

Order for Judgment.

(Filed March 23, 1964.)

This matter having been heard by the Court on the 20th day of March, 1964, in the presence of James F. X. O'Brien, attorney for the plaintiff, and Dickinson R. Debevoise, appearing for Riker, Danzig, Scherer & Brown, attorneys for the defendant, on defendant's motion to amend its answer, and on plaintiff's motion for summary judgment; and the Court having considered the pleadings and proofs before it, and having heard and considered the arguments of counsel, and it appearing that there is no genuine issue as to any material fact challenged, and that plaintiff has a right to judgment as a matter of law,

It is, thereupon, on this 23rd day of March, 1964, ORDERED that defendant's motion to amend its answer be and it is hereby denied; and it is further

ORDERED that judgment final be and it is hereby entered in favor of plaintiff and against defendant, and that to the end of granting the relief sought in the complaint, it is hereby ORDERED AND DETERMINED that:

(1) Inasmuch as plaintiff dissented to defendant's plan of re-capitalization and did not waive her rights by surrendering her shares of 6% preferred stock in form and manner as requested by defendant, plaintiff's right in and to unpaid, cumulative dividends accrued to January 1, 1957 in the amount of $73.50 per share on her shares of 6% Preferred Stock of defendant corporation, were not cancelled, nullified, destroyed or adversely affected by the stock re-capitalization of defendant corporation adopted and approved on September 28, 1962, and plaintiff's rights in and to said accrued dividends continue to constitute a valid and subsisting property right owned by her and protected against confiscation or diminution by defendant until paid to her according to law; and

(2) Plaintiff, upon delivery by her to defendant of her shares of defendant's old 6% Preferred Stock, is entitled to receive from defendant for each share of 6% Preferred Stock so delivered by her, the following shares of new substituted stock, to wit:

1 share Common stock;

1 share Convertible Preferred stock;

1.3 shares Prior Preferred stock;

together with all dividends declared on any of said stocks, with lawful interest at 6% from the date such dividends were payable to the date of payment to plaintiff; provided further that, in the case of shares of Prior Preferred Stock called by defendant, then in lieu of such stock, the sum of money payable on the call as principal and accrued dividends, together with interest at 6% on said call money from the date same was payable to holders of such Prior Preferred Stock to the date of payment to plaintiff and, provided further, that in the case of any of said common stock and any Convertible Preferred stock having been substituted by common stock of Socony Mobil Oil Company, Inc. (which defendant's counsel noted as the surviving entity following merger of defendant and said Socony), then in lieu of said common stock and Convertible Preferred stock of defendant corporation, such shares of stock in said Socony Mobil Oil Company, Inc. as represent the exchange under the merger plan as and for said stock of defendant corporation, together with any dividends declared or to be declared on said stock here determined to be owned by plaintiff, together with interest at 6% from

the payment date of such dividends to the date paid to plaintiff; and

(3) Plaintiff have costs of this suit to be taxed.

NELSON K. MINTZ,
J. S. C.

Consented to as to form only.

RIKER, DANZIG, SCHERER & BROWN,
Attorneys for Defendant,

By: DICKINSON R. DEBEVOISE,
A Member of the Firm.

APPENDIX B

New Jersey Supreme Court Mandate on Reversal

This cause having been duly argued before this Court by Mr. Dickinson R. Debevoise, counsel for the appellant and Mr. James F. X. O'Brien, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is in all things reversed, set aside and for nothing holden; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 1st day of February, 1965.

JOHN H. GILDEA
Clerk of the Supreme Court

Filed Feb. 1, 1965

JOHN H. GILDEA
Clerk

APPENDIX C

Virginia Supreme Court Certificate Allowing Appeal

Pursuant to Rule 5:5 of the Rules of the Supreme Court of Appeals of Virginia, I. Howard G. Turner, Clerk of the said Court, do hereby certify that an appeal of right was awarded on November 23, 1965, from an order entered by the court below on September 28, 1962, in the suit therein depending under the short style of Marybelle Louise O'Brien v. Virginia-Carolina Chemical Corporation.

Appeal bond is required in the penalty of $300 in conformity with Code, § 8-477, and within the time allowed by Code, § 8-489.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

Walter E. Rogers, State-Planters Bank Building, Richmond, Virginia,

James F. X. O'Brien, 17 Academy Street, Newark, New Jersey,
Counsel for Appellant.

John S. Battle, Jr., 1400 Ross Building, Richmond, Virginia,

Douglas D. Drysdale, Court Square Building, Charlottesville, Virginia,

Riker, Dansig, Scherer & Brown, 744 Broad Street, Newark 2, New Jersey,
Counsel for Appellee.

Given under my hand this 24th day of November, 1965.

H. G. TURNER
Clerk

APPENDIX D

Virginia Supreme Court Opinion

Present:

Eggleston, C.J., Buchanan, Snead, I'Anson, Carrico and Gordon, JJ.

Record No. 6293

MARYBELLE LOUISE O'BRIEN,

v.

SOCONY MOBIL OIL COMPANY, Successor, etc.

OPINION BY JUSTICE THOMAS C. GORDON, JR.
Richmond, Virginia, January 16, 1967
FROM THE STATE CORPORATION COMMISSION

On September 28, 1962, the stockholders of Virginia-Carolina Chemical Corporation ("VC") approved an amendment to its certificate of incorporation, providing for the conversion of all outstanding shares of VC's 6% Cumulative Dividend Participating Preferred Stock (the "Old Preferred") into newly authorized shares of stock and the cancellation of all dividend arrearages on the Old Preferred. On the same day, VC filed articles of amendment with the State Corporation Commission, and the Commission entered an order issuing a certificate of amendment. The Commission issued the certificate pursuant to

§ 59 of the Virginia Stock Corporation Act, which became effective January 1, 1957.[1]

When the certificate of amendment was issued, Marybelle Louise O'Brien owned 100 shares of Old Preferred. On October 4, 1965, Miss O'Brien filed a notice of appeal from the Commission's order, and on the same day she filed a petition for appeal to this Court. In the petition she contested the validity of the certificate of amendment issued by the Commission, insofar as it affected her right to undeclared dividends that had cumulated before January 1, 1957. By order entered November 23, 1965, we granted her an appeal of right from the Commission's order of September 28, 1962.

Both Miss O'Brien and VC[2] filed briefs in this Court on the merits of the case. In these briefs they asked us to decide the case on the merits, even though the notice of appeal and petition for appeal had not been filed within the time specified by our Rules and the applicable Virginia statutes.

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[1] The Virginia Stock Corporation Act was enacted in 1956 (Va. Acts of Assembly 1956, ch. 428, at 487) and codified as Va. Code Ann. Title 13.1 chap. 1, §§ 13.1-1 *et seq.* The reference in the text to § 59 of the Act is to Code § 13.1-59. Future references to sections of the "Virginia Stock Corporation Act" or the "Act" will similarly omit the number of the Title (13.1).

[2] On November 29, 1963, VC (a Virginia corporation) merged into Socony Mobil Oil Company, Inc. (a New York corporation), which later changed its name to Mobil Oil Corporation. Reference in this opinion to VC after that date should be taken as reference to Socony Mobil Oil Company, Inc. or Mobil Oil Corporation as successor to VC.

Appendix D

Our Rule 5:1 § 13 provides that no appeal shall be allowed from an order of the Commission unless the appellant files a notice of appeal with the clerk of the Commission "within sixty days after final order or judgment". That Rule also requires the clerk to file the certified transcript with the clerk of this Court "within the time allowed by the statute", and requires the appellant to file a petition for appeal with the clerk of this Court "within like time". Code § 12-63 provides that an appeal from an order of the Commission "shall be taken and perfected within four months from the date of such . . . order . . ." Va. Code Ann. § 12-63 (Repl. vol. 1964); see also Va. Code Ann. § 3-463 (Repl. vol. 1957) and Va. Code Ann. § 8-489 (Supp. 1966). These requirements are mandatory or jurisdictional. See *Condrey* v. *Childress*, 203 Va. 755, 127 S. E. 2d 150 (1962); *Andrews, Executrix* v. *Cahoon*, 196 Va. 790, 86 S. E. 2d 173 (1955); *Skeens* v. *Commonwealth*, 192 Va. 200, 64 S. E. 2d 764 (1951). Accordingly, before oral argument of the case we requested supplemental briefs dealing with our jurisdiction to entertain the appeal. The question now before us is whether we must dismiss the appeal because the appellant failed to comply with the time requirements of the Rules and statutes.

Before discussing reasons advanced by counsel why this Court has jurisdiction to entertain this late appeal, we will outline the nature of the controversy and the steps taken before the controversy reached us.

The record shows that Miss O'Brien acquired her 100 shares of Old Preferred before January 1, 1957. (The precise date of acquisition is not disclosed.) These shares were issued pursuant to VC's original certificate of incorporation, which became effective upon its organization in

Appendix D

1926. The pertinent provisions of the certificate of incorporation are copied in the footnote.[3]

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[3] "FOURTH

"II

"6% Cumulative Dividend Participating Preferred Stock.

"1. The holders of the Preferred Stock shall be entitled . . . to receive, out of the surplus of the corporation . . . or out of the net earnings of the corporation, when and as declared by the board of directors of the corporation, dividends at the rate of . . . 6% per annum from the date of the issue of the Preferred Stock, payable quarterly on such dates as shall be determined by the board of directors of the corporation, in priority to any dividends on the Common Stock of the corporation . . . From and after July 1, 1927, such dividends at the rate of 6% per annum on the Preferred Stock shall be cumulative. No dividend shall be paid or set apart for payment on the Common Stock of the corporation in any fiscal year, after July 1, 1927, unless and until all such accumulated dividends on the Preferred Stock for all previous fiscal years subsequent to July 1, 1927, shall have been paid or set apart for payment in full, but without interest, nor unless and until full dividends on the Preferred Stock for the current and all preceding dividend periods of the current fiscal year either shall have been paid or set apart for payment . . ."

* * *

"EIGHTH

"The following provisions are inserted for the regulation of the business and for the conduct of the affairs of the corporation and for further creating, defining, limiting and regulating the powers of the corporation, its directors and its stockholders:

"11. The corporation reserves the right to amend, alter, change or repeal any provisions contained in this certificate in

(Footnote continued on following page.)

Appendix D

In 1956, the General Assembly of Virginia enacted the Virginia Stock Corporation Act, which was patterned on the Model Business Corporation Act of the American Bar Association.[4] (See Report by the Code Commission of Virginia for Revision of the Laws Relating to Corporations, H.D. 5, Virginia General Assembly (1956).) The Act became effective January 1, 1957. On that day, the cumulated undeclared dividends on the Old Preferred totaled $73.50 per share, the arrearages having accumulated principally in the depression years of the 1930's.

Before the effective date of the Virginia Stock Corporation Act, Virginia law did not authorize VC to cancel a stockholder's cumulated undeclared preferred dividends,

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(Footnote continued from preceding page.)

the manner now or hereafter prescribed by law, subject to the provisions of paragraph 6 of sub-division I and paragraph 5 of sub-division II of Article Fourth hereof, and all rights conferred on stockholders hereunder are granted subject to this provision."

[Paragraph 6 of sub-division I of Artcile Fourth related to the 7% Prior Preference Stock, which was fully retired in 1936. Paragraph 5 of sub-division II of Article Fourth provided in substance that, without the consent of at least two-thirds of the Old Preferred, the corporation would not (a) increase the authorized amount of the 7% Prior Preference Stock, (b) increase the authorized amount of the Old Preferred, or create any stock on a parity with the Old Preferred or any stock (other than the 7% Prior Preference Stock) having priority over the Old Preferred or alter or change the preferences of the Old Preferred, or (c) create liens on the coporation's property or assets, except for certain dsecribed liens.]

[4] See footnote 1.

without the stockholder's consent.[5] However, § 55 of the Virginia Stock Corporation Act provided:

> "§ 13.1-55. *Right to amend articles of incorporation.*—A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, provided that the amendment may contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making such amendment.
>
> "In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as:
>
> • • •
>
> "(k) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared (whenever accrued and whether or not earned)."[6]

On August 6, 1962 VC's board of directors approved a plan of recapitalization, to be effected by amending the

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[5] Before 1938 Virginia law did not provide for the elimination of accrued undeclared dividends by charter amendment in any case without the consent of each stockholder affected thereby. Beginning in 1938 and until January 1, 1957, Virginia law permitted a corporation to eliminate accrued undeclared dividends, by the favorable vote of 90% of each class of stockholders affected thereby, only if such dividends had not been earned or had not been declared because of capital deficit. Va. Acts of Assembly 1938, ch. 309, at 444. Counsel apparently concede these conditions were not met in the case of the cumulated dividends on the Old Preferred.

[6] A two-thirds stockholders' vote is required, as more fully set forth in footnote 7.

certificate of incorporation. The proposed amendment called for the creation of two classes of new preferred stock, 5% Prior Preferred Stock and 5% Convertible Preferred Stock. It provided that when the amendment became effective, "each outstanding share of the presently authorized 6% Cumulative Dividend Participating Preferred Stock of the Corporation . . . [the Old Preferred] with all dividend *arrearages thereon,* shall be automatically changed and converted into the following: (i) One (1) share of Common Stock of the Corporation; plus (ii) One and three-tenths (1.3) shares of the new 5% Prior Preferred Stock of the Corporation; plus (iii) One (1) share of the new 5% Convertible Preferred Stock of the Corporation". (Emphasis supplied.)

At the annual stockholders' meeting on September 28, 1962, the proposed amendment was approved by the favorable vote of more than two-thirds of the total outstanding shares of stock and more than two-thirds of the outstanding shares of each class of stock of VC, including the Old Preferred.[7] (72.1% of the shares of the Old Pre-

[7] § 56 of the Virginia Stock Corporation Act requires, for adoption of an amendment, the affirmative vote of the holders of more than two-thirds of the shares entitled to vote on the amendment or, if any class or series of shares is entitled to vote as a class, the affirmative vote of the holders of more than two-thirds of the shares of each class or series entitled to vote thereon and of the total shares entitled to vote thereon. § 57 of the Act prescribes that the holders of shares of any class shall be entitled to vote as a class, whether or not the articles of incorporation so provide, if (among other matters) the amendment would effect a reclassification of the shares of such class.

Section 56 provides further: "The articles of incorporation may require a greater vote than herein prescribed, either for all amendments or for particular amendments, and any such requirement can itself be changed only by the vote so prescribed". VC's certificate of incorporation required no greater vote for any amendment.

ferred were quoted for the amendment.) As already stated, the State Corporation Commission issued a certificate of amendment on September 28, 1962.

Miss O'Brien received due notice of the stockholders' meeting, with a proxy statement and a copy of the proposed articles of amendment. She appeared at the meeting by proxy, objected to the plan of recapitalization and charter amendment, and cast a negative vote. Miss O'Brien recognized VC's right to recapitalize under the Virginia Stock Corporation Act, effective January 1, 1957, including the right under § 55(k) to eliminate dividends accruing after the effective date of the Act; "but [she] refused to recognize that portion of the plan which called for the surrender of any rights to cumulated but undeclared dividends accruing prior to January 1, 1957". So Miss O'Brien accepted the provisions of the recapitalization plan that entitled her to receive shares of Common Stock, new 5% Prior Preferred Stock and now 5% Convertible Preferred Stock; but she repudiated the provisions of the plan that cancelled pre-1957 cumulations on the Old Preferred.

On December 21, 1962 Miss O'Brien filed a civil action against VC in the Superior Court of New Jersey, Chancery Division, Essex County. That Court held that Miss O'Brien's right to "unpaid, cumulative dividends accrued to January 1, 1957 in the amount of $73.50 per share on her shares of 6% Preferred Stock [the Old Preferred] . . . continue[s] to constitute a valid and subsisting property right owned by her and protected against confiscation or diminution by . . . [VC] until paid to her according to law . . ."

On appeal, the Appellate Division certified the case to the Supreme Court of New Jersey. The Supreme Court

reversed the judgment of the Superior Court and dismissed Miss O'Brien's complaint, subject to conditions. *O'Brien* v. *Virginia-Carolina Chem. Corp.*, 44 N. J. 25, 206 A. 2d 878 (1965). The conditions were that VC waive any time limitation on the institution of proceedings in Virginia to review the State Corporation Commission's action in approving the amendment to VC's certificate of incorporation or to question the validity of the recapitalization plan, and that the appropriate Virginia court accept jurisdiction and render a decision on the merits. The Supreme Court of New Jersey dismissed the complaint as a matter of comity. "In deference to the Commonwealth of Virginia, we feel the courts of New Jersey should withhold their hand on the issue in order to permit a relevant adjudication there." *Id.* at 41, 206 A. 2d at 887.

VC executed a waiver as suggested by the Supreme Court of New Jersey and, as already mentioned, both it and Miss O'Brien have urged us to decide the issue on the merits. Counsel advance several grounds to support our jurisdiction.

Counsel for Miss O'Brien point out that § 156(d) of the Constitution and the statutes of Virginia permit an aggrieved person to appeal to this Court from an order of the State Corporation Commission, even though the aggrieved person was not a party to the proceeding before the Commission, citing *Jones* v. *Rhea*, 130 Va. 345, 107 S. E. 814 (1921). They point further to the fact that Miss O'Brien did not enter an appearance in the Commission before it entered the September 28, 1962 order issuing the certificate of amendment. They contend that because Miss O'Brien was entitled to appeal from the Commission's order and was not a party to the proceedings before the Com-

mission, the time limitations respecting prosecution of the appeal are not applicable to her.

Miss O'Brien had actual notice, however, that an amendment to the certificate of incorporation would be considered and voted on by the stockholders at the September 28, 1962 meeting. VC mailed the notice to her on August 24, 1962, and the notice was accompanied by a proxy statement and the full text of the proposed amendment. Moreover, § 59 of the Virginia Stock Corporation Act put her on notice that the Commission would issue a certificate of amendment upon presentation of articles of amendment evidencing compliance "with the requirements of law".

Before the certificate of amendment was issued, Miss O'Brien could have requested the Commission to hold a hearing, as provided for under the Commission's Rules of Practice and Procedure, to consider her contention that the articles of amendment did not comply with the requirements of law. She did not ask for a hearing. In any event, the time limitations prescribed by our Rules and Code §§ 8-463, 8-439 and 12-63 are applicable to appeals from all orders of the Commission, including orders issuing certificates of amendment.[8]

It was suggested at oral argument that the State Corporation Commission has jurisdiction to enter a declaratory judgment deciding the merits of this case. See *Bridge Corp.* v. *City of Richmond*, 203 Va. 212, 123 S. E. 2d 636 (1962). Perhaps, despite the passage of time since entry of the Commission's order issuing the certificate of amend-

[8] A stockholder's right to appeal from an order of the Commission issuing a certificate of amendment was recognized in *French* v. *Cumberland Bank and Trust Co.*, 194 Va. 475, 74 S. E. 2d 265 (1953).

ment, the Commission has jurisdiction to enter a declaratory judgment to resolve an actual controversy whether its order is void for constitutional reasons. But that issue is not properly before us. We will not decide on appeal whether the Commission should have entered a declaratory judgment, where (as here) neither party requested the Commission to enter a declaratory judgment and the Commission did not enter a declaratory judgment.[9] *Jones Transfer Co.* v. *Commonwealth*, 174 Va. 184, 5 S. E. 2d 628 (1939). Furthermore, as pointed out in *Jones Transfer Co.*, we have no original jurisdiction to enter a declaratory judgment.

Counsel for VC argue that we can waive the time limitations for appeal in this case, as we did in three habeas corpus cases: *Cabanias* v. *Cunningham*, 206 Va. 330, 143 S. E. 2d 911 (1965); *Thacker* v. *Payton*, 206 Va. 771, 146 S. E. 2d 176 (1966); and *Stokes* v. *Payton*, 207 Va. 1, 147 S. E. 2d 773 (1966). In each of those cases, we directed that a convicted felon be permitted to appeal to this Court, though the time for perfecting the appeal had expired, or

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[9] At oral argument, counsel asked us to treat this appeal as an appeal from a decision set forth in an opinion rendered by the State Corporation Commission on October 21, 1965. The Commission's opinion was prompted by Miss O'Brien's request that it certify the record for appeal to this Court, despite the lapse of time since entry of the Commission's order of September 28, 1962. In the course of the opinion, the Commission made certain declarations respecting the effect and validity of § 55 of the Virginia Stock Corporation Act. But those declarations cannot be deemed to amount to a "decision", from which an appeal can be prosecuted under Va. Code Ann. § 12-63.1 (Repl. vol. 1964). The only decision announced by the Commission's opinion was the decision to certify the record. Neither party challenges that decision.

that he be retried or released from custody. These alternatives were dictated by mandates of the Supreme Court of the United States, accompanying its holdings in several cases that persons convicted of felonies had been denied their constitutional right to appeal. E.g. *Lane* v. *Brown*, 372 U. S. 477, 481, 9 L. ed. 2d 892, 83 S. Ct. 768 (1963).

We permitted late appeals in the *Cabaniss, Thacker* and *Stokes* cases because of overriding constitutional requirements that operated to suspend the time requirements for appeal to this Court. This permission was based upon our holdings that Cabaniss, Thacker and Stokes had been denied their constitutional rights. For reasons to be set forth, we hold that Miss O'Brien has been denied no constitutional right. The question whether the precedent of the *Cabaniss, Thacker* and *Stokes* cases should be followed in cases involving denial of constitutional property rights can therefore be deferred, and should be deferred, for decision when that issue is presented.

The New Jersey Superior Court interpreted § 55(k) of the Virginia Stock Corporation Act as referring only to dividends that might accrue after January 1, 1957, the effective date of the Act. We do not agree. Section 55(k) authorizes the cancellation of accrued but undeclared dividends "whenever accrued and whether or not earned". This language, not found in the Model Act, was intended to make it doubly certain that pre-1957 cumulations could be cancelled. Nor do we agree with the Superior Court's conclusion that our interpretation renders § 55(k) unconstitutional.

When Miss O'Brien acquired her shares of Old Preferred she joined with the other owners of equity interests

in the corporation. As a stockholder she acquired certain rights and privileges spelled out in VC's certificate of incorporation. These rights and privileges were subject to change, however, by the requisite vote of her fellow stockholders as prescribed by the Virginia corporation laws in effect when she acquired the stock *or* in effect at any time thereafter. Miss O'Brien's "contract" with VC so provided. Under paragraph 11, Article Eighth, of the certificate of incorporation, VC reserved the right to "amend, alter, change or repeal" any provision contained in the certificate "in the manner now or hereafter provided by law". See footnote 3, *ante*.[10]

Furthermore, Miss O'Brien's rights and privileges were subject to change pursuant to the provisions of the Virginia Stock Corporation Act because of the power reserved by the State under § 150 of the Constitution of Virginia to alter or amend a corporate charter by the enactment of new corporation laws. *French v. Cumberland Bank and Trust Co.*, 194 Va. 475, 74 S. E. 2d 265 (1953).

Counsel for Miss O'Brien concede the power reserved by the State to enact legislation that permits change of stockholder rights, except where the rights are vested property rights. They contend Miss O'Brien has a vested property right to undeclared dividends that accrued before January 1, 1957. She has a vested property right, they

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[10] As set forth in footnote 3, this reservation was made subject to the provisions of paragraph 6, sub-division I, and paragraph 5, subdivision II, of Article Fourth. However, paragraph 6 was no longer applicable when the 1962 charter amendment was adopted, and paragraph 5 was complied with when the 1962 charter amendment was adopted because more than two-thirds of the Old Preferred voted in favor of the amendment as required by paragraph 5.

argue, because Virginia law before January 1, 1957, did not permit VC to eliminate the Old Preferred stockholders' rights respecting these dividends without her consent. They conclude that § 55 of the Virginia Stock Corporation Act, as we have interpreted it, unconstitutionally deprives Miss O'Brien of this vested property right.[11]

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[11] The "vested right" theory is discussed in the revisors' Comment on § 56 of the proposed Act, which reads:

> "The two-thirds rule of this section is the most important provision of the Act. It will restore the original design of the Virginia law (Acts 1902-3-4, ch. 270, p. 437, ch. I § 7, ch. III § 5c) and as the same time make it identical with the Model Act. This repeals the 90% requirement of § 13-90 which has proved unworkable, unnecessary and outmoded. It resulted from a theory, popular in the 1920's, that certain rights, which no one could define, were 'vested' and immune from change except on unanimous consent. This theory has been found unnecessary as a matter of constitutional law and impossible as a matter of corporate business. It has thus been abandoned: 'Almost any amendment may be authorized by statute to be made with reference to the share contract, common or preferred, if the statute covers it clearly. The doctrine of vested rights protecting certain portions of the share contract have been found illusory.' (Ballentine on Corporations, rev. ed., 1946, p. 649). To the same effect see *French* v. *Cumberland Bank and Trust Co.*, 194 Va. 475, 482 (1953).
>
> "While establishing the two-thirds rule, the bill assures fourfold protection to stockholders:
>
> "1. In case of important changes . . . [enumerated in § 57], a two-thirds vote is required separately by each affected class even if expressly deprived of any voting power by the charter.

(Footnote continued on following page.)

Appendix D

The provisions of VC's certificate of incorporation relating to Old Preferred refute, however, the theory that Miss O'Brien has a vested eproperty right in any cumulated undeclared dividends.

Miss O'Brien was entitled to receive dividends on her shares of Old Preferred only out of the surplus or net earnings of the corporation and only "when and as declared by the board of directors of the corporation". (See footnote (3) *ante.*) Miss O'Brien's dividends did not "accrue" like interest on a debt. Undeclared dividends are not a corporate debt. They are an expectancy, ripening into debt only when legally declared.

The certificate of incorporation established a dividend priority in favor of the holders of Old Preferred, expressed

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(Footnote continued from preceding page.)

"2. If the parties desire any greater voting requirement and put it in the charter, what they say controls. [See the last paragraph of footnote *7, ante.*]

"3. Special notice of the stockholder meeting must be given, not for the usual minimum of 10 days but for a special minimum of 25 days, and it must be accompanied by a copy of the proposed change so as to afford full opportunity for its consideration (§ 13.1-26).

"4. Should any question of fraud arise, the courts are given jurisdiction before the Commission acts to determine it and grant all appropriate relief (§ 13.1-125).

"These provisions will put Virginia in line with the modern provisions of a majority of the States.". Report by the Code Commission of Virginia for Revision of the Laws Relating to Corporations, *supra*, H. D. 5, Virginia General Assembly (1956). See Gibson, *How Fixed Are Class Shareholder Rights?*, 23, Law & Contemp. Prob 283 (1958); Gibson, *The Virginia Stock Corporation Law of 1956*, 42 Va. L. Rev. 603 (1956).

as a negative covenant: "No dividend shall be paid or set apart for payment on the Common Stock of the corporation in any fiscal year, . . . unless and until all such accumulated dividends on the . . . [Old Preferred] for all previous fiscal years . . . [and the current fiscal year] shall have been paid or set apart for payment in full . . ." (See footnote (3), *ante.*) Until such time as this negative covenant had been changed by the requisite vote of stockholders under the current corporation laws of Virginia, Miss O'Brien could have enjoined the corporation from paying dividends on Common Stock in contravention of the covenant. At no time could she have enforced payment of undeclared preferred dividends.

Miss O'Brien had no property right in the accumulated earnings and surplus of the corporation. They never represented a fund dedicated for payment of undeclared dividends. Because Miss O'Brien had no right to demand a payment of cumulated undeclared dividends and no claim to the funds out of which they might be paid, she necessarily had no vested property right in undeclared dividends that accured before January 1, 1957.[12]

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[12] Counsel for Miss O'Brien cite *Johnson* v. *Johnson & Briggs, Inc.*, 138 Va. 487, 122 S. E. 100 (1924), and *Craddock-Terry Co.* v. *Powell*, 131 Va. 417, 25 S. E. 2d 363 (1943), as supporting their position that rights respecting cumulated undeclared dividends on VC's Old Preferred are vested property rights.

Both of these cases, however, involved corporate liquidations. The Johnson & Briggs, Inc. charter provided, with respect to distributions to be made in the liquidation of the corporation, that holders of the preferred stock should receive the par amount of their shares "and the amount of dividends accumulated and unpaid thereon before any amounts shall be payable to the holders of common stock". We held

(Footnote continued on following page.)

In *French* v. *Cumberland Bank and Trust Co., supra*, 194 Va. 475, 74 S. E. 2d 265 (1953), French contended he had been unconstitutionally deprived of his vested right to elect a director of the bank. When French acquired his stock, the bank's charter provided for cumulative voting, and the applicable Virginia statute permitted change of voting rights only if 90% of the affected stockholders agreed to change. Because French owned slightly more than

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(Footnote continued from preceding page.)

that, in making distribution of the net assets of the corporation upon its dissolution, the corporation was obligated to make the preferential liquidating distributions specified in its charter, including an amount equal to accumulated and unpaid dividends, even though the earnings of the corporation did not equal the amount of such dividends. We pointed out that the rules applicable to the declaration of dividends by a going corporation differ from the rules applicable to the making of liquidating distributions on the dissolution of a corporation.

When Craddock-Terry Co. was liquidated, its charter provided that the preferred stockholders should be "preferred as to assets to the extent of the par value thereof, but no further, in the case of the liquidation of the company". Again, we held that the preferred stockholders were entitled to the preferential liquidating payments specified in the charter.

These cases did not involve the right of a corporation to change the provisions of its charter by stockholder action authorized under the corporation laws. Rather, they involved the right of a stockholder to enforce the existing share contract in accordance with its terms. The contracts provided that the preferred stockholders should receive preferential liquidating distributions, including (in the case of Johnson & Briggs, Inc.) an amount equal to cumulated unpaid dividends. Each corporation being in the process of liquidation, the share contract obligated the board of directors to cause the net assets (after payment of debts) to be first distributed in satisfaction of the preferential payments prescribed for preferred stockholders. Our holdings in the cases do not support Miss O'Brien's contention that she has a vested right in undeclared dividends of a going corporation.

10% of the bank's preferred stock, he could control the election of at least one director by voting cumulatively, and he could preserve his right to vote cumulatively by withholding his consent to any change of voting rights. After French acquired his stock, the Virginia statute was amended so as to permit the bank to eliminate cumulative voting by a charter amendment approved by vote of two-thirds, instead of 90%, of the preferred stock. The bank then eliminated cumulative voting by a charter amendment adopted pursuant to the provisions of the amended statute. We rejected French's contention that he had been deprived of a vested right. We pointed out that because of the power reserved by the State, French "acquired and held his stock with full knowledge that the voting rights of his shares of stock for directors might be changed by general law, with or without his consent." *Id.* at 482, 74 S. E. 2d at 269.

Counsel for Miss O'Brien would have us distinguish the *French* case because of the different between voting rights and rights to cumulated undeclared dividends. We have no proper basis, however, for upholding the State's power to provide for the elimination of one right while denying its power to provide for the elimination of the other right. Neither right is a vested property right, and each is subject to change by proper corporate action under existing corporate law.

Veix v. *Sixth Ward Assn.*, 310 U. S. 32, 84 L. Ed. 1061, 60 S. Ct. 792 (1940), supports our conclusion that Miss O'Brien was denied no constitutional right by the change of her stock contract. Veix bought prepaid shares in the Sixth Ward Building & Loan Association. After Viex acquired his shares, New Jersey enacted a statute that changed his original share contract by curtailing his right to make withdrawals. Veix sought to withdraw his funds

pursuant to the provisions of his original contract, but payment was not made because of the change effected by the new statute. Viex then brought action against the Association, alleging that the change effected by the subsequent legislation contravened the impairment of contract and due process clauses of the Constitution of the United States. The Supreme Court held the amendments to Viex's share contract effected by the statute were valid and enforceable because "the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares." *Id.* at 38, 84 L. Ed. at 1065, 60 S. Ct. at 794.

> "This power of the State to protect its citizens by statutory enactments affecting contract rights, without a violation of the contract clause of the Constitution, is analogous to the power often reserved to amend charters. Under this reserved power, it is held that the relations between a stockholder or certificate holder and the corporation may be varied without impairing the contract existing between the corporation and its stockholder or member." *Id.* at 40, 84 L. Ed. at 1066-67, 60 S. Ct. at 796.

Appeal dismissed.

APPENDIX E

Virginia Supreme Court Order of Dismissal

VIRGINIA:

In the Supreme Court of Appeals held Building in the City of Richmond on at the Supreme Court of Appeals Monday, the 16th day of January, 1967.

MARYBELLE LOUISE O'BRIEN,

Appellant,

against

SOCONY MOBIL OIL COMPANY, SUCCESSOR TO VIRGINIA-CAROLINA CHEMICAL CORPORATION,

Appellee.

Record No. 6293

UPON AN APPEAL OF RIGHT FROM AN ORDER ENTERED BY THE STATE CORPORATION COMMISSION ON THE 28TH DAY OF SEPTEMBER, 1962

This day came again the parties, by counsel, and the court, having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellant did not comply with Rule 5:1 & 13, and Code §§ 12-63, 8-489, as amended, and 8-463 in perfecting this appeal. It is, therefore Adjudged, Ordered and Decreed that the said appeal be, and the same is hereby dismissed, and that the appellant pay to the appellee its costs by its expended about its defense herein.

Which is ordered to be certified to the said Corporation Commission.

APPENDIX F

New Jersey Supreme Court Order Denying Motion to Vacate Dismissal

(Filed—March 21, 1967.)

SUPREME COURT OF NEW JERSEY
M-273 SEPTEMBER TERM 1966

MARYBELLE LOUISE O'BRIEN,

Plaintiff-Respondent,

vs.

VIRGINIA CAROLINA CHEMICAL CORPORATION,

Defendant-Appellant.

This matter having been duly presented to the Court, it is Ordered that the motion to vacate dismissal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 21st day of March, 1967.

A TRUE COPY

JOHN H. GILDEA,
Clerk